such. It makes no difference that the object is to present only one side of the question; innumerable religious trusts have been established to present other sides. It makes no difference that most people regard that side as the wrong side, if rational persons can and do regard it as the right side and can and do believe that its advancement will benefit mankind. At the end of the eighteenth century a learned writer said that no person in a Christian country can complain of the prohibiting of a denial of Christianity, for "even an infidel must acknowledge that no benefit can be derived from the subversion of a religion which enforces the best system of morality." [36] But the sincere disbeliever does not acknowledge this. On the contrary, he believes that the spread of what he regards as truth and the removal of what he regards as superstition would conduce to the benefit of mankind. Surely the truth will prevail though the courts do not attempt to decide *a priori* what is the truth.

LIABILITY OF OCCUPIERS OF PREMISES TOWARD TRESPASSERS. — In his last written utterance Dean Thayer spoke of the "powerful weapon" which "the modern law of negligence places in the hands of the injured person and how little its full scope has been realized until recently," [1] and he showed how many questions of which we have been seeking arbitrary solutions under the doctrine of *Rylands* v. *Fletcher*, or by setting up special categories of carrier and passenger, were really to be dealt with on a broad simple principle of liability.[2] Decisions on the liability of occupiers of premises toward trespassers are affording another example.

A person who comes upon premises in the control of another may be injured by the latter's negligent management of an active force, or he may be injured by reason of the condition of the premises upon which he comes. If the former, it ought not to matter in what capacity he comes. It should be a question whether a reasonable man managing the force which the occupier of the premises was operating would have anticipated injury to the person in question under the circumstances. If so the ordinary principle of liability should hold him to repair the injury following from his want of due care. Whether the person injured was invitee, licensee,[3] perceived trespasser,[4] anticipated but not perceived trespasser [5] or

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[36] SWIFT, SYSTEM OF LAWS OF CONN., vol. 2, 323.

[1] "Liability Without Fault," 29 HARV. L. REV. 801, 805.

[2] *Ibid.*, 805, 813.

[3] Gallagher *v.* Humphrey, 6 L. T. R. (N. S.) 684; De Haven *v.* Hennessey, 137 Fed. 472; Pomponio *v.* New York R. Co., 66 Conn. 528, 34 Atl. 491; Schmidt *v.* Coal Co., 159 Mich. 308, 123 N. W. 1122; Hyatt *v.* Murray, 101 Minn. 507, 112 N. W. 881; Knowles *v.* Exeter Mfg. Co., 77 N. H. 268, 90 Atl. 970; Hoadley *v.* Int. Paper Co., 72 Vt. 79, 47 Atl. 169.

[4] Rome Furnace Co. *v.* Patterson, 120 Ga. 521, 48 S. E. 166; Fields *v.* Louisville R. Co., 163 Ky. 673, 174 S. W. 41; Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; Hobbs *v.* Blanchard, 74 N. H. 116, 65 Atl. 382.

[5] Schmidt *v.* Coal Co., 159 Mich. 308, 123 N. W. 1122; Brown *v.* Boston R. Co., 73 N. H. 568, 64 Atl. 194; Magar *v.* Hammond, 171 N. Y. 377, 64 N. E. 150; Cincinnati R. Co. *v.* Smith, 22 Ohio St. 227; O'Leary *v.* Elevator Co., 7 N. D. 568, 75 N. W. 919.

unanticipated trespasser,[6] should go only to the question whether there was due care in not looking out for him. On the other hand, if the occupier of the premises is not doing anything active, but the injury results from the condition of the premises upon which the injured person comes, the question at once arises, why should the occupier, who is doing nothing, bestir himself to look out for the safety of those who come upon his premises? Why should they not look out for themselves, as they would do anywhere else, except as to negligence of those pursuing an active course of conduct? These considerations have required differentiation between trespassers, licensees and business guests or invitees. Control of his premises by the occupier must be balanced against the interest of personality of the person coming on the premises. Therefore, so far as condition of the premises goes, he who comes thereon takes the risk[7] unless he comes on as business guest or invitee, that is, upon the business of the occupier. In the latter case there is a relation to which the law may properly attach a duty of due care.[8] But a distinction is to be made. No one may call upon the law to secure him in any claim of wilful aggression upon another. Accordingly, if the occupier, without management of any active force, intends injury to those who come on his premises, in whatever capacity, he comes within another general principle that requires one to respond for all injuries which he causes wilfully. Hence the universal holding that the occupier is liable to trespassers for wilful aggression or its equivalent.[9]

Looking back over the development of the law the foregoing lines are evident. But, to use the classical words of Mr. Justice Holmes, they have had to be "pricked out by the gradual approach and contact of decisions on the opposing sides."[10] In this process many strong courts started out to treat the first situation along the lines of the second. Some denied liability for negligent management of an active force to the injury of trespassers, perceived or unperceived, while admitting a liability to licensees.[11] Others denied liability therefor except in case of business guests or invitees.[12] In either event liability for wilful injury was admitted, thus more or less completely assimilating the first situation to the second.

As always happens in such cases, the courts that refused to apply the general principle of negligence to negligent management of an active force by an occupier of premises causing injury to a trespasser or licensee were presently called upon to warp other legal doctrines to avoid unhappy

[6] See the remarks of SEAMAN, J., in Sheehan *v.* St. Paul R. Co., 76 Fed. 201, 205.

[7] Ponting *v.* Noakes, [1894] 2 Q. B. 281.

[8] Indermaur *v.* Dames, L. R. 1 C. P. 274.

[9] Bird *v.* Holbrook, 4 Bing. 628.

[10] Noble State Bank *v.* Haskell, 219 U. S. 104, 112, 31 Sup. Ct. Rep. 186.

[11] Grand Trunk R. Co. *v.* Barnett, [1911] A. C. 361; Gallagher *v.* Humphrey, 6 L. T. R. (N. S.) 684; Jordan *v.* Grand Rapids R. Co., 162 Ind. 464, 70 N. E. 524; Rink *v.* Lowry, 38 Ind. App. 132, 77 N. E. 967; Lando *v.* Chicago R. Co., 81 Minn. 279, 83 N. W. 1089; Hyatt *v.* Murray, 101 Minn. 507, 112 N. W. 881; Koegel *v.* Missouri R. Co., 181 Mo. 379, 80 S. W. 905; Schaaf *v.* St. Louis Basket Co., 151 Mo. App. 55, 131 S. W. 936.

[12] Neice *v.* Chicago R. Co., 254 Ill. 595, 98 N. E. 989; Cunningham *v.* Toledo R. Co., 260 Ill. 589, 103 N. E. 594; Maynard *v.* Boston R. Co., 115 Mass. 458; O'Brien *v.* Union R. Co., 209 Mass. 449, 95 N. E. 861; Hoberg *v.* Collins, 80 N. J. L. 425, 78 Atl. 166.

consequences. For one thing, they were called upon to create a special category of passengers to whom duties of due care were owing as such.[13] For another, they actually did for a season warp the conception of business guest or invitee, by a strained doctrine of implied invitation, so as, in effect, to allow recovery by licensees or unmolested trespassers injured by negligent active operations of the occupier.[14]

It is not to be wondered at, then, that we now find one of these courts warping the idea of wilful injury and leaving it to the jury to find in effect that there is a trap for trespassers in something put on the land, not for the purpose of injuring them, but maintained for wholly proper ends and negligently suffered to become and remain dangerous.[15] The court says offhand that there is "nothing in" the proposition that suffering the defect in the condition of the premises must amount to an intention to injure trespassers in order to give rise to liability.[16] But the distinction between suffering premises to become unsafe for trespassers by inaction and actively providing means of injuring anticipated trespassers has always been drawn,[17] and in the case of injurious devices actively provided the distinction has been drawn between those provided for legitimate purposes which are incidentally dangerous to trespassers and those provided immediately because they are dangerous to trespassers.[18] To say that a dangerous condition into which the premises have fallen may be maintained wilfully so as to create a liability to trespassers is to say that occupiers of premises are bound to furnish trespassers a safe place in which to trespass. Hence, unless our notions of property are to break down utterly, this extension of the idea of wilful or wanton injury is not likely to have more utility than the attempt to extend the idea of "invitation" to endured trespassers. For while the latter was to some extent justified as an attempt to plow round the limitation of liability for negligence in the management of active force by occupiers of premises, the former, with all its possibilities for that situation, is actually applied to a case of a trespasser injured by the condition of the premises which the law was already treating on rational lines.

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[13] It is significant that of eleven cases on this subject in BEALE, CASES ON CARRIERS, 119–136, all but one are from Illinois and Massachusetts. In those jurisdictions plaintiff's only hope of showing a duty of due care was to induce the court to hold that a duty was owing to him as a passenger. So the question came to the court as one of whether, although not an invitee, he was a passenger.

[14] Sweeny *v.* Old Colony R. Co., 10 All. 368. See the argument of counsel in Stevens *v.* Nichols, 155 Mass. 472, 29 N. E. 1150, reported in AMES & SMITH, CASES ON TORTS, 2 ed., 443.

[15] Romana *v.* Boston Elevated R., 226 Mass. 533, 116 N. E. 218. See RECENT CASES, p. 313.

[16] 226 Mass. 537, 116 N. E. 218.

[17] See, for example, Cleveland R. Co. *v.* Ballentine (C. C. A.) 84 Fed. 935, 938; Gibson *v.* Leonard, 143 Ill. 182, 192, 32 N. E. 182; Lary *v.* Cleveland R., 78 Ind. 323, 328; Quigley *v.* Clough, 173 Mass. 429, 430, 53 N. E. 884; Gramlich *v.* Wurst, 86 Pa. St. 74, 80; Pittsburgh R. Co. *v.* Brigham, 29 Ohio St. 364.

[18] Bird *v.* Holbrook, 4 Bing. 628; Hooker *v.* Miller, 37 Ia. 613; Quigley *v.* Clough, *supra;* Loomis *v.* Terry, 17 Wend. 497, 501. Compare also the rule that contributory negligence is no bar in case of a wilful or wanton injury. Here something more than a gross negligence is meant; there must be aggression or its equivalent. Banks *v.* Braman, 188 Mass. 367, 74 N. E. 594; Birmingham R. Co. *v.* Pinckard, 124 Ala. 372, 26 So. 880; Lary *v.* Cleveland R. Co., 78 Ind. 323, 328; Denman *v.* Johnston, 85 Mich. 387, 48 N. W. 565; Barlow *v.* Foster, 149 Wis. 613, 136 N. W. 822.

THE FUNDAMENTAL LAW IN ENGLAND. — That the sovereignty of the King in Parliament is absolute is a commonplace about which there can today be no question; and it is a sovereignty at every point strengthened by the absence in England of the usual American distinction between constitutional and ordinary legislation. But while sovereignty thus attaches to the supreme legislative authority its administration is a matter open at every point to judicial inquiry. The King's ministers are below the law; and whatever they attempt outside the common law must somewhere find its sanction within the four corners of a statute. The significance of this distinction has arisen in an interesting way in *R.* v. *Halliday*,[1] recently decided by the House of Lords. By the Defense of the Realm Consolidation Act [2] the King in Council was empowered, during the continuance of the war, "to issue regulations for securing the public safety and the defense of the realm." [3] Under this general power *Reg.* 14 *b* empowered the secretary of state to order the internment of any person "of hostile origin or association" where, upon the opinion of a competent naval or military authority, it appears to him expedient to do so in accordance with the purpose of the authorizing statute. Under this regulation a naturalized German named Zadig was interned. He appealed against regulation 14 *b* as unauthorized by the act and thus *ultra vires*. The majority of the House seems to have had no difficulty in sustaining the opinion of the court below which had upheld the regulation. The case, however, is remarkable for a very able and vigorous dissenting opinion by Lord Shaw of Dunfermline which raises an issue of immense importance. He argues, in the first place, that certain English statutes, and notably Magna Charta and the Habeas Corpus Act, are so fundamental to the English Constitution as to be incapable of repeal except by the definite and declared purpose of the King in Parliament; [4] and, as a corollary to this first proposition, he insists that any administrative regulation which, in the absence of such declared purpose, tends towards this end, is by that fact *ultra vires*.[5] It is at least an interesting attitude; and though there is a sense in which it has about it a certain antiquarian character, it is also an antiquarianism with a significantly modern implication. It in nowise denies the sovereignty of Parliament; and in this sense it differs from those legal conceptions of early English law which seem to have postulated certain fundamentals which even Parliament was powerless to alter.[6] But it suggests that what Dean Pound [7] has aptly termed "executive justice" must at every point show express authority for its institution. It cannot change the common law unless it can definitely show that such was the intention of Parliament; an enabling act, in fact, must give evidence of having been reasonably construed.[8] It is, of course, a common-

[1] [1917] A. C. 261.
[2] 5 GEO. V, c. 8.
[3] *Ibid.*, sec. 1, sub-sec. 1.
[4] [1917] A. C. 261, 294.
[5] *Ibid.*, 298.
[6] *Cf.* C. H. MCILWAIN, THE HIGH COURT OF PARLIAMENT, especially ch. 11.
[7] *Cf.* his paper in 55 AMERICAN LAW REGISTER, 137.
[8] LORD SHAW in H. of L., page 288. *Cf.* (on a very different issue) *Re* Dudley corporation (1881), 8 Q. B. D. 86, 93, C. A. The earlier cases make this issue perfectly clear. *Cf.* Chudleigh's Case (1595); 1 Coke Rep. 113 *b*; Delamere *v.* Barnard (1567), Plowd. 346, 532; Herbert's Case (1584), 3 Co. Rep. 11 *b*. 13 *b*; Fermor's Case (1602), 3 Co. Rep. 77 *a*.

place of statutory construction that judicial interpretation should be directed to the avoidance of consequences which are inconvenient and unjust, so long as this can be achieved without violence to the act concerned.[9] Clearly enough there was inconvenience in the regulation; and the matter of injustice may perhaps be settled by the fact that since Mr. Zadig complied with the regulation he suffered internment without trial; whereas, had he disobeyed it, he would at least have had the opportunity of going before the courts.[10] But this is surely to show either the unnecessary character of the original regulation or its stupidity in that it puts a premium on disobedience to the executive. It is, moreover, significant that high authorities have viewed with concern the growing extent of this administrative justice;[11] and the opinion that it is not warranted by the facts is fairly widespread.[12] Certainly the "irresistible clearness" of which Lord Justice Swinfen Eady spoke in the Court of Appeal seems nowhere justified by the facts. Everyone is, of course, willing to give government a latitude in time of war different both quantitatively and in kind from its powers in time of peace; but in the absence of an express delegation of the immense powers contained in *Reg.* 14 *b* the desire of Parliament to grant them is at least a matter for doubt. This is, of course, simply a matter of opinion. The whole question is a psychological one, and the facts at issue may be differently interpreted. The only point of importance here is that if a complete power of general regulation was thus conceded, an energetic secretary of state may make the courts superfluous. We come, in fact, to the vital question that is involved in the whole problem of administrative law — the conference of such powers as render efficiency a certainty with the adequate retention of complete official responsibility. Here, at least, the argument in the Lords suggests that Lord Shaw has made out a case against the assumption of a balance. The theoretical assumption is even more important. It is historically indubitable that England does not know fundamental laws. But when the courts begin to feel that the spirit of the Constitution is not adequately protected by its literal statement in terms of legislation, there is the opportunity at least of wide-spread change. There is little or no adequate evidence that the courts have ever declared an English statute unconstitutional.[13] What Lord Shaw demanded in his opinion was that an administrative regulation should be declared unconstitutional because its results would fail to harmonize with the spirit of English law. It is, in fact, an appeal to due process of law; and "due process" — already made sacred by an English statute [14] — is, in theory at least, connected with the idea of a law so fundamental that men cannot change it. The resemblance between such a conception and M. Duguit's "objective" law is, of course, obvious enough. It is flexible in that it admits that the objective law

[9] York *v.* Middleburgh (1828), 12 Y. & J. 196, 215.

[10] LORD SHAW in H. of L., 277.

[11] *Cf.* for a typical instance HOUSE OF LORDS DEBATES, November 8, 1915, the speech of Lord Loveburn, page 182, and of Lord Courtney. *Cf.* PENWITH, 194.

[12] *Cf.* LONDON NATION, Feb. 12, 1916.

[13] *Cf.* Pound, 21 HARV. L. REV. 383.

[14] 5 EDW. III, c. 9; 25 EDW. III. stat. 5, c. 4; 37 EDW. III. c. 18. *Cf.* MCKECHNIE, MAGNA CARTA, 2 ed., 390.

may change with the facts at issue; [15] were England invaded, its content would be different from the situation involved in a continental war. The whole point involved is the disappearance of the Roman notion of sovereignty and its replacement by the idea of a service to which the state itself, no less than its members, are bound. In *Rex* v. *Halliday* the court mistook these implications by its determination to regard the issue as a purely administrative question. Its result, as Lord Shaw, perhaps somewhat dramatically, asserted, is to make the government "a Committee of Public Safety . . . the analogy is with a practice more sinister, more sinister, the *lettres de cachet* of Louis Quatorze. . . . It . . . is the negation of public safety or defense. It is poison to the commonwealth." [16] No one who considers the problem involved can doubt that we are here at the beginning of an evolution which may result in giving a new significance to the notion of the supremacy of law.

RIGHT OF A PATENTEE TO RESTRICT THE PRICE AND THE USE OF A PATENTED ARTICLE. — At common law any attempt to restrict the use or price of a chattel by notice to the purchaser or sub-purchaser was held void [1] as contravening the public policy in favor of the free alienation of chattels.[2]

The Patent Act grants to the patentee the exclusive right to "make, use, and vend" the article patented.[3] It has been contended that this monopoly granted to the patentee takes the patented article out of the general common law rule, and that the exclusive right to use and to vend enables the patentee, indirectly, by a license arrangement to restrict the use and the price of his patented article by a mere notice attached thereto, and that any use or sale of the article in violation of the license constitutes an infringement of the patent. Since a suit for infringement of a patent right is a suit arising under the patent laws of

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[15] *Cf.* DUGUIT, DROIT SOCIAL, DROIT INDIVIDUEL, lect. 1, and *cf.* Cohen, "Jus Naturale Redivivum," 25 PHILOSOPH. REV. 761 *f.*

[16] [1917], A. C. 292.

[1] Appollinaris Co. *v.* Scherer, 27 Fed. Rep. 18; Garst *v.* Hall and Lyon Co., 179 Mass. 588, 61 N. E. 219; Spencer's Case, 5 Coke, 16 *a.*

[2] See Park *v.* Hartman, 153 Fed. Rep. 24, 39, where Lurton, J., speaking for the court, said: "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints on alienation have generally been regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in COKE ON LITTLETON, § 360, 'be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.'" This passage is quoted with approval by Mr. Justice Hughes in Dr. Miles Medical Co. *v.* Park and Sons Co., 220 U. S. 373, 404; 31 Sup. Ct. Rep. 376, 383. See also GRAY, RESTRAINTS ON ALIENATION, 2 ed., §§ 27, 28.

[3] U. S. COMP. STAT. 1913, § 9428; U. S. REV. STAT. § 4884.